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IN THE

Supreme Court of the United States

October Term of 1975

No. **75-671**

JOSEPH GANIE,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel and on the Brief:
MARIA MARINARI SYPEK
Gerald R. Stockman, P. A.
Broad Street Bank Building
Trenton, New Jersey 08608

GERALD R. STOCKMAN
Attorney for Petitioner
Broad Street Bank Building
Trenton, New Jersey 08608

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No.

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OPINIONS BELOW

The jury trial held in the United States District Court of New Jersey resulted in the guilty verdict for the defendant. See Appendix A. A motion for a new trial was held on November 4, 1974 at the Federal District Court of New Jersey granting a new trial on two Counts, but denying it as to the third Count. See Appendix B. The United States Court of Appeals For the Third Circuit affirmed the unreported finding of the Federal District Court of New Jersey on October 6, 1975 in an unreported opinion, see Appendix C.

JURISDICTION

The opinion of the Court below was entered on October 6, 1975.

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The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1254(1).

Questions Presented

Whether the United States Court of Appeals For the Third Circuit erred in failing to require a new trial where the initial presentation of a Fourteen Count indictment to the jury, later inexplicably reduced to Four Counts created an unduly prejudicial effect in abrogation of the Petitioner's rights of due process.

The United States Court of Appeals For the Third Circuit erred in failing to grant a new trial where the jury reached its verdict based on false and misleading testimony which was emphasized through a re-reading once deliberations commenced, in derogation of the petitioner's constitutional rights guaranteed under due process of law.

The United States Court of Appeals For the Third Circuit erred in failing to grant a new trial where the totality of the circumstances surrounding the trial denied the petitioner's constitutional right to a fair trial.

Constitutional and Statutory Provisions

The relevant provision of the United States Constitution involved in this case is Amendment 5. This provision is set forth in Appendix D. The relevant statute under which the petitioner was convicted is 26 U. S. C., Sec. 7206(2), the body of which is set forth in Appendix D.

Statement of Case

Mr. Joseph Ganie and his wife, Elinor, were indicted on April 4, 1973. A Fourteen Count indictment alleged violations of 18 U. S. C., Sec. 371 and 26 U. S. C., Sec. 7206(2) involving conspiracy and aiding and abetting in the preparation of false income tax returns which they knew to be false and fraudulent as to material matters.

Mr. Ganie is a fifty-year old, black family man with four children, who worked himself up from various jobs to his present position as an area manpower representative of the A. F. L.-C. I. O. Human Resources Development Institute. In addition to that position, Mr. Ganie, as a family venture, operates an income tax service, his clientele constituting the lower middle class to middle class worker. His service is operated from his home and has been since 1954. Briefly, the procedures he uses are as follows: He interviews the client, prepares the proper tax return, reviews it with the client, has the client sign the form, then mails the form along with any checks as may be required to the Internal Revenue Service. Some months later after the tax season, he sends each client a copy of the form as submitted to the Internal Revenue Service.

A trial date was set for June 18, 1974 to take place in the United States District Court of New Jersey. After a two-day delay, since the government's case was not ready, the trial actually began June 21, 1974. At that time, the government made a motion to dismiss all counts of the indictment against Elinor Ganie, as well as Counts One, Six, Seven, Eight, Nine, Ten, Eleven, Thirteen and Fourteen of the same indictment against Joseph Ganie. This was subsequently made known to the jury.

Up to this point, and including the trial itself, the defendant had been represented by Robert R. Ross, Esq., an Attorney-at-Law in Trenton, New Jersey. Mr. Ross, on the night of June 20, 1974, the eve of the actual trial, experienced a great family tragedy in the unexpected death of his mother-in-law. The circumstances and their effect on his ability to adequately conduct the trial the next morning are part of the record on appeal through supplementary affidavits.

Despite the mental stress and strain of Mr. Ross, it was decided that the trial should proceed in view of the two-day delay the jury had already experienced. The government produced in the main, four witnesses, all of whom were clients of Mr. Ganie and allegedly victims of his false filing.

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Count Twelve of the original indictment was dismissed at the end of the government's case. Therefore, the jury considered and rendered a verdict on a Four Count indictment. They found defendant Ganie not guilty on Count One, and guilty on the two counts involving Sarah Coleman, and the Fourth Count involving the Dominiak return.

Dietrich, Stockman & Lake, P. A. were substituted as attorneys and a motion for a new trial was argued by Gerald R. Stockman, Esq., of that firm. The Hon. George H. Barlow, U. S. D. J. granted the motion for a new trial sought under F. R. Crim. P. 33 on the two counts involving the Coleman return, but denied the motion as to the Dominiak return. (Appendix B). The defendant thereafter appealed the denial of the motion for a new trial as to the Dominiak return to the U. S. Court of Appeals for the Third Circuit. On October 6, 1975, the United States Court of Appeals for the Third Circuit affirmed the decision of the Federal District Court of New Jersey (Appendix C).

The essential facts upon which the appeal was based and upon which the Petition for Writ of Certiorari is now based concerns the testimony of Sarah Coleman and its effect on the entire verdict, and more particularly, on the finding of guilt as to the Dominiak Count.

Mrs. Coleman testified that Mr. Ganie had prepared her 1971 and 1972 income tax returns. She testified that she had not told Mr. Ganie to deduct the $129.50 on her 1971 return and the $128.70 on her 1972 return for the state and local gasoline tax. It was elicited on direct examination that she does not own a car, nor does she buy gasoline for anyone else. However, on cross, although agreeing that Mr. Ganie entered what she had told him to enter on the return, she stated that she did not tell him to deduct the gasoline tax and further, that it was not included on the copy she herself received in the mail and which she had in her possession at trial.

After the case was submitted to the jury, and after approximately two hours of deliberation, without a verdict, the jury requested a clarification: "Did Sarah Coleman testify that the

copy of her income tax which she had in her purse did not have the gas deduction on it?" Upon the insistence of defense counsel not to merely answer the question directly, it was decided by the Court to re-read the entire testimony, which was done. Defense counsel had argued that the deductions had to be included on her copy given the duplicating process used by Mr. Ganie. The Assistant U. S. Attorney maintained that his special agent had seen a copy of the return and that the deductions were not included. The Judge ordered the U. S. Attorney to obtain a copy to determine the truth.

Meanwhile, the jury informed the court that they had reached a verdict. Thus, the jury deliberated without the benefit of the actual document. Subsequently, defense counsel was informed by the U. S. Attorney that the document had been obtained, and that the deductions were, in fact, included. The U. S. Attorney, when asked by defense counsel about the special agent's representation, claimed that he had misunderstood the special agent and that he had merely been told by Mrs. Coleman the deductions were not included.[1]

On this basis, the motion for a new trial was granted as to the Coleman counts. As such, Mr. Ganie was sentenced to a $1,000 fine on the Dominiak count.

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[1]Unfortunately, the record does not reflect these events. However, the affidavits submitted as part of the record on appeal support the facts as stated herein.

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Reasons For Granting The Writ

1. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENIED A CRIMINAL DEFENDANT'S FEDERAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL IN ACCORDANCE WITH DUE PROCESS OF LAW IN CONFLICT WITH OTHER FEDERAL COURT DECISIONS.

The re-reading of the false, though highly relevant testimony to a jury where the jury specifically requested a ruling by the Court of what the witness originally stated, such statements in actuality being false, is in and of itself a denial of due process. The United States Court of Appeals For the Third Circuit erroneously considered the appeal for a new trial as being one based on newly discovered evidence (Appendix C). To the contrary, the issue centers upon a jury requesting information from the Court which, given as testified, contained false material statements. Although the Court was unaware of the falsity at the time of trial, the truth was, ironically, within the reach of the Court and in the knowledge of the U. S. Attorney. (Mrs. Coleman had her copy in her purse while testifying). Only after the inquiries of the jury did the issue of whether the deductions were included on the witness's own copy became relevant to the Court and to the attorneys involved. Only then was the attempt made to obtain the copy itself.

The Court of Appeals is in conflict with the reasoning of three cases decided in its own Third Circuit: *United States v. Meyers*, 484 F. 2d 113 (3d Cir. 1973); *United States v. Rabb*, 453 F. 2d 1012, (3d Cir. 1971); *United States v. Jackson*, 257 F. 2d 31 (3d Cir. 1958). In the *United States v. Meyers, supra*, the Court of Appeals reversed the Federal District Court finding that false testimony by a prosecution witness required that a new trial be granted the defendant since such evidence was so tainted, "that the conviction based on such testimony should not be permitted to stand." *Id.* at 117. The witness had testified

that a certain check was already endorsed by the defendant when presented to him as bank teller by another and based on such testimony, a handwriting expert testified that that was the defendant's signature, thereby connecting the defendant to a conspiracy scheme of mail fraud. After the trial, and after a guilty verdict was entered, the truth was discovered that the check had not been endorsed at that time and that the witness had, in fact, instructed a third person to sign the defendant's name. The Court found that this was not really newly discovered evidence *Id.* at 116, but rather a situation where a prosecution witness falsely testified at trial. Here, the test is one espoused in *Larrison v. United States*, 24 F. 2d 82, 87 (7th Cir. 1928):

> "1. The Court is reasonably well satisfied that the testimony given by a material witness is false; 2. That without it, a jury *might* have reached a different conclusion; 3. That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

Here, it is submitted that (1) the testimony is known to have been false (2) the jury might have found otherwise (see discussion *infra.*, Point 2 (3) The defendant was surprised and unaware of the falsity until after the trial.[2]

In *Meyers*, the Court could not even be sure of the part the testimony played in jury deliberations, but here, however, it is clear from the jury's request to know whether the witness stated that it was or was not on her copy, that the jury focused their attention on this one peculiar fact. It is contended that the actual copy should have been supplied since the question of re-reading the testimony was paramount, particularly where it was argued by the defense that such testimony was false and maintained on the other hand by the prosecution that it was true.

Re-reading testimony is done with caution as it, at times, unduly emphasizes certain facts. The Third Circuit in *United States v. Jackson, supra.*, found that the jury was entitled to

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[2]Unfortunately, the record does not reflect these events. However, the record for the appeal contains affidavits supporting the facts as stated.

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be informed of the information requested as a matter of right. In that case, the jury, during the course of their deliberation, asked the Court whether a witness, who was an informer, was a government employee. The judge felt he was unable to answer this question and, therefore, the jury was sent to resume deliberations without a response to their inquiry. Thereafter, arguments ensued between defense counsel and the government's counsel, with the judge finally deciding to read a portion of the transcript which would show that the informer was, in fact, paid by the government. However, before this information could be relayed to the jury, the judge was notified that they had reached a verdict. The judge asked whether they needed the answer to their earlier question, and the foreman responded that they no longer required such and thereby returned a guilty verdict. The Court of Appeals in *Jackson* found the question posed by the jury highly relevant. The issue of entrapment was essential in this case, and, therefore, the question of whether the informer was a government employee was of major import. *Id.* at 43.

The Third Circuit, thus failed to apply *Jackson* to the extent that the failure to submit the document itself to the jury created an unfair and prejudicial result with respect to the defendant's case. The importance of responding to a jury's request in the best possible way was highlighted in the *United States v. Rabb, supra.* In this case, the jury requested testimony of the three eyewitnesses be read. The Court of Appeals found that such testimony was absolutely crucial to their jury's determination of the appellant's guilt or innocence in that this was the only evidence linking the defendant to the crime. The *Jackson* and *Rabb* decisions are important to support the petitioner's contention that the testimony of Sarah Coleman and the consideration of the actual copy of her tax return was so crucial in the minds of the jury in reaching an ultimate verdict that a denial of the copy itself and merely the submission of the false testimony was similar to not allowing a re-reading of crucial testimony as found in these two cases.

2. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT WAS A CONSIDERATION OF A FEDERAL QUESTION NOT YET SETTLED BY THE UNITED STATES SUPREME COURT.

This particular issue of false testimony has not been decided by this Court although there are cases having some application here. The line of cases following *Mooney v. Holohan*, 294 U. S. 109 (1934); *Mesarosh v. United States*, 352 U. S. 1 (1956); *Napue v. Illinois*, 360 U. S. 264 (1958) with a most recent application in *DeMarco v. United States*, 415 U. S. 449 (1974) shed some light on the issue of false testimony. In *Mooney* and *Napue*, the facts show that the prosecuting attorney had knowledge that the evidence introduced was false at the time of trial.

In *Mesarosh*, the prosecutor later determined that the witness had a history of perjury and a psychologically induced habit of not telling the truth. He, therefore, moved to have the Federal District Court conduct a hearing to determine that there was other sufficient evidence to sustain the conviction. However, the Court found that a new trial should be granted in favor of the defendant rather than acceding to the procedure requested by the prosecuting attorney. *Id.* at 13. It is noteworthy that the Court found that a new trial be granted all the defendants since the false testimony tainted the proceedings making it impossible to discern if other evidence existed in the case to support a guilty conviction.

Here, where the main witnesses were the tax clients of the defendant who claimed to have no knowledge of "false" entries on their tax returns yet admitted that they would tell the petitioner what to enter on the forms; that they would review the return with the petitioner; and would receive a photocopy some months later, the question of credibility is great. The jury convicted the petitioner on three out of four counts. The First Count involved one of the witnesses' returns, whose testimony in no way supported the offense alleged. The Second and Third

Counts involved the Coleman returns, (the Coleman testimony contained the pertinent false statements.) The Fourth Count involved the Dominiak return. Mr. Dominiak testified, speaking in broken English, and insistently denied having told the petitioner to enter a deduction for union dues. It should be noted that he was extremely difficult to understand, and by his testimony, it seems, had difficulty himself in understanding many of the questions.

The fact that the jury highlighted the Coleman testimony regarding her own copy implies that the jury found a mode by which the petitioner intentionally falsely filed the returns without the individual client-witness' knowledge, that is, by not showing these deductions on the clients' own copy, yet making such deductions on the forms actually filed with the Internal Revenue Service. This is completely and utterly erroneous as was clearly shown to be so once the copy was retrieved. Of note is that the U. S. Attorney never espoused such a theory and it was merely by a stroke of fate that such a theory was so formulated.

It is the obligation of the Court system to now allow a new trial to correct the tainted and polluted evidence that the jury is now known to have considered. Based on the reasoning of *Mesarosh*, it should be found here that a denial of due process exists where false testimony is allowed to remain as the basis of a conviction. If the jury, as it likely did, found that the petitioner had worked out the method described as the means of false filing, no one can now separate the tainted evidence from the original verdict as to the Coleman counts and the Dominiak Count (which was the final Count and probably last deliberated one once the "guilty" verdict was reached on Coleman).

In *Napue v. Illinois, supra.*, the prosecution's witness who had been previously found guilty of murder and who was now testifying against the defendant accused of the same murder denied having been promised anything for his testimony. It was later determined that he had been given promises and that the prosecution had not stopped or clarified the false testimony during the trial. It was contended by the state, throughout the appeal for a new trial based on the realization that false testimony

had been given, that this testimony was not, in fact, false but rather that the time the promise was made was actually in dispute. *Id.* at *267*. Convictions obtained through false evidence known to be false by a representative of the state falls under the Fourteenth Amendment. See *Mooney v. Holohan, supra.; Pyle v. Kansas*, 317 U. S. 213 (1940). The same result occurs when the state, although not soliciting false evidence allows it to go uncorrected when it appears. *Alcorta v. Texas*, 355 U. S. 28 (1959).

> "The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. *Napue v. Illinois*, 360 U. S. 264 at 269 (1958)."

It is not clear from the record that the United States Attorney knew of the falsity, although it is arguable that he should have known the true contents.[3]

It is contended here that in the light of the facts and the state of the present law as formulated by the Federal Courts that the decision regarding false testimony be extended here by this Court to a situation where (1) it is not clear, the U. S. Attorney did not know of its falsity, and (2) even if he was not aware of the falsity, the resulting effect is a denial of due process because of the essential pivotal question of intent and credibility

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[3]The special agent for the U. S. Attorney's Office had access to Mrs. Coleman's copy. As a matter of fact, Mrs. Coleman stated the following on cross examination with reference to the special agent's investigation:

> "They asked me if Mr. Ganie filed my income tax. I said, 'yes', and he asked me could he see my '71 receipt and '72. I said, 'yes, you can see them.' He said, 'Do you mind going upstairs getting them for me' which I did, went up and got them. He looked them over. He said, 'Thank you for your cooperation.' What he was writing down, I don't know. I didn't read what they wrote down. They didn't show me what they wrote down, just told me to sign it. Q. 'Told you to sign the statement?' A. The statement they were there and they looked at my receipts, the '71 and '72."

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which is the basis of the offense for which the petitioner has been convicted.

DeMarco v. United States, 415 *U. S.* 449 (1974) again involves the false testimony of a prosecution's witness who stated that he had not been promised more favorable treatment by the state for his testimony. The United States Court of Appeals had found in this case that a promise had been made after the testimony was given. This Court granted the Petition for Writ of Certiorari finding that the fact question of when the promise was made should be determined by the Federal District Court and therefore remanded it to that Court vacating the Court of Appeals decision. *Id.* at 450.

3. THIS COURT HAS NOT SETTLED THE QUESTION OF WHETHER IT IS A DENIAL OF DUE PROCESS TO ALLOW THE U. S. ATTORNEY TO DISMISS A MAJOR PART OF A MULTIPLE COUNT INDICTMENT INITIALLY PRESENTED TO THE JURY, THE DISMISSAL OCCURRING BEFORE THE ACTUAL TRIAL HAD COMMENCED.

The Court has settled the point that an amendment by a Federal Court to an indictment returned by the Grand Jury is in violation of the Fifth Amendment. *Ex Parte Bain*, 121 U. S. 1 (1886), *Salinger v. United States*, 272 U. S. 542 (1926). It is not contended here that the dismissal of all but five counts against Joseph Ganie of the original indictment consisting of twenty-eight counts between Elinor and Joseph Ganie constitutes an amendment and, therefore, these cases have no application.

This Court has also considered cases dealing with "variance" that is where the evidence is at variance with the offenses alleged in the indictment. The question of whether any existing variance is prejudicial has been settled by this Court in the test espoused in *Berger v. United States*, 295 U. S. 78 (1935). Variance would prejudice the case if the defendant is not adequately informed of the charges against him, and (2) he is not protected from being prosecuted again for the same offense. The petitioner does not seek to apply this concept.

Rather, the petitioner contends that his constitutional right of due process has been abridged since at the outset of the trial, the government, through the Court, introduced to the jury the indictment against Elinor and Joseph Ganie, charging them with conspiracy with each other and others involving some fourteen substantive counts against each defendant.

The jury so understood the government's case from the time it was selected on June 18, 1974 until Friday, June 24, 1974 when the actual trial began. At that time the Court made a brief statement to the jury indicating that the government had dismissed all counts against Mrs. Ganie and had dismissed

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Counts One, Six, Seven, Eight, Nine, Ten, Eleven, Thirteen and Fourteen against Joseph Ganie leaving for the jury's consideration, five counts, Counts Two, Three, Four, Five and Twelve.

No explanation was offered to the jury as to why the charges were dismissed. Moreover, at the conclusion of the government's case, the Court indicated out of the presence of the jury, that it would dismiss one more count of the indictment since the government's proofs were obviously inadequate to support this count as well. The jury was not informed of this fact until sometime after the defendant took the stand in his own defense. Again, no explanation was given for this action. The Court did, however, in its general instruction, correctly state the fact that no inferences were permitted to be drawn from an indictment. It should be noted, however, that the Court did not instruct the jury as to the inferences permitted from the dismissal of the aforementioned charges.

It is recognized that it has been customary for defendants charged in multiple-count indictments to plead to one or more of the counts and have the Court dismiss the remaining. *McClintock v. United States*, 60 F. 2d 839 (10th Cir. 1932); *Gunville v. United States*, 386 F. 2d 186 (8th Cir. 1967), See *Alschuler, The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. R. 50 (1968). However, it is submitted that a jury might easily infer from a long list of accusations followed by a trial only on a few, that the government generously and gratuitously acting on its own initiative, dismissed charges even though the defendant was probably guilty of most or all of these offenses as well, but that the government would not involve everyone with the expense and time of a long, intricate trial. Rather, it would present and be satisfied with a conviction of only a few charges.

This element proved to be highly prejudicial, particularly with the indictment against the petitioner. The form of the indictment is similar to a litany in which most of the Fourteen Counts were identical, generally dissimilar only regarding the individuals involved. Thus, the natural inclination of the jury would be to believe that the petitioner had done something wrong being accused of doing the same thing fourteen different times.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the petitioner be granted his Petition for Writ of Certiorari.

Respectfully submitted,

Gerald R. Stockman

GERALD R. STOCKMAN
Attorney for Petitioner

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IN THE

November Term of 1975

No.

JOSEPH GANIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Certificate of Service

I, Gerald R. Stockman, Attorney for Petitioner, JOSEPH GANIE, do hereby certify that on this, the 5th day of November, 1975, three copies of the foregoing Petition for a Writ of Certiorari have been served on the following:

Solicitor General
Department of Justice
Washington, D. C. 20530

Attorney of record for the Respondents by personal service to the office of the above named.

Gerald R. Stockman

GERALD R. STOCKMAN

APPENDIX A

Verdict Rendered in Federal District Court of New Jersey

THE COURT: That is all, ladies and gentlemen. You may return now and resume your deliberation.

(The jury left the courtroom at 1:55 P.M.)

(The following occurred at 3:00 P.M.)

(The jury entered the courtroom)

(Defendant present)

(Roll call of the jury)

THE CLERK: Ladies and gentlemen of the jury, have you agreed upon your verdict?

THE JURY: Yes.

THE CLERK: Who shall speak for you?

THE JURY: The Forelady.

THE CLERK: Please rise.

Is the verdict unanimous?

THE FORELADY: Yes.

THE CLERK: Do you find the defendant guilty or not guilty on Count 1?

THE FORELADY: Not guilty.

THE CLERK: Do you find the defendant guilty or not guilty on Count 2?

THE FORELADY. I don't know which one you are talking about, Count 2 in the indictment? For the first one, Burgos. Coleman is guilty.

THE CLERK: Do you find the defendant guilty or not guilty on Count 3?

THE FORELADY: Guilty.

THE CLERK: Do you find the defendant guilty or not guilty on Count 4?

THE FORELADY: Guilty.

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THE CLERK: Ladies and gentlemen of the jury, hearken to your verdict as the Court shall order it recorded.

You say you find the defendant not guilty on Count 1; guilty on Count 2; guilty on Count 3; and guilty on Count 4, and so say you all?

THE COURT: Poll the jury, please.

(The jury was polled)

APPENDIX B

Order of Federal District Court of New Jersey Granting New Trial Counts II and III and Denying New Trial Count IV

FOR THE DISTRICT OF NEW JERSEY
Criminal No: 192-73

UNITED STATES OF AMERICA :
v. :
JOSEPH GANIE AND ELINOR :
GANIE, : ORDER
Defendants. :

This matter being opened to the Court by Dietrich, Stockman & Lake, P. A., substituted attorneys of record for the defendants, Gerald R. Stockman, Esq., appearing, and the United States of America being represented by the United States Attorney's Office, Richard T. Philips, Esq., Assistant United States Attorney appearing, and the Court having examined the moving papers and heard oral argument;

IT IS on this 2nd day of Dec., 1974, ORDERED that in accordance with Rule 33 of the Federal Rules of Criminal Procedure, the defendant Joseph Ganie, be granted a new trial on Count II and III of the Amended Indictment (the Counts involving Sarah Coleman's tax returns), and

It is FURTHER ORDERED that the defendant's motion for a new trial as to his conviction of the Fourth Count of the Indictment (the Ludwik Dominiak's tax return) is denied, and judgment of conviction is entered thereon.

/s/ GEORGE H. BARLOW, JUSDC

We hereby consent to the form of the within Order.

JONATHAN L. GOLDSTEIN
U. S. Attorney
Attorney for U. S. of America

By: /s/ Richard T. Philips

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APPENDIX C

Opinion and Judgment of United States Court of Appeals For The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75–1461

UNITED STATES OF AMERICA

v.

JOSEPH GANIE and

ELINOR GANIE

JOSEPH GANIE, *Appellant*

(D. C. Criminal No. 192–73)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12(6) October 3, 1975

Before MARIS, VAN DUSEN and HUNTER,
Circuit Judges

Gerald R. Stockman, Esq., Dietrich, Stockman, & Lake, P. A., Trenton, N. J.,
Attorneys for Appellant

Jonathan L. Goldstein, U. S. Attorney; Maryanne T. Desmond, Assistant U. S. Attorney; Newark, N. J.
Attorneys for Appellee

Judgment Order

After considering the contentions raised by appellant that (a) in the interest of justice, a new trial should be granted on the entire verdict due to erroneous and misleading testimony reread to the jury, causing an unfair and prejudicial result to follow,[1] and (b) the totality of the circumstances surrounding the trial denied the appellant his right to a fair trial,[2] it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:

Van Dusen
Circuit Judge

Dated: Oct. 6, 1975

Attest:
Thomas F. Quinn
THOMAS F. QUINN, *Clerk*

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[1]See *United States v. Meyers*, 484 F. 2d 113, 116 (3d Cir. 1973); 2 Wright, Federal Practice and Procedure — Criminal § 551, at p. 482 (1969).

[2]Compare *Sheppard v. Maxwell*, 384 U. S. 333, 352–55 (1966), with the defendant's version of the facts in the instant case.

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APPENDIX D

Constitutional and Statutory Provisions

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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26 U. S. C. 7206(2) — Fraud and False Statements

Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-671

JOSEPH GANIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) erroneous testimony adduced on two counts of a multi-count indictment tainted his conviction on another count and (2) the government's dismissal of several counts of the indictment at the beginning of trial denied him due process of law.

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on three counts of preparing fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). The district court granted petitioner's motion for a new trial as to two of the counts, but imposed a fine of $1,000 on the remaining count (Pet. App. B). The court of appeals affirmed (Pet. App. C).

1. Petitioner, the manager of an income tax return preparation service, was charged with having claimed various tax deductions on behalf of taxpayers Ludwik Dominiak,

Sarah Coleman, and Hector Burgos, to which they were not entitled. Specifically, the Dominiak return for 1972 (G.X. 1)[1] claimed a $192 deduction for union dues, although the taxpayer had never belonged to a union (Tr. 14-15), and it substantially overstated his expenses for medical insurance premiums and work-related safety equipment (Tr. 15-16, 27). Dominiak testified that he did not authorize these deductions, that he had signed the return without having checked petitioner's calculations, and that petitioner did not provide him with a copy of his completed return until eight months after the return had been filed (Tr. 15-17, 25, 33).

The Coleman returns for 1971 and 1972 (G.X. 2, 3) listed substantial deductions for state and local gasoline tax payments. Coleman testified that she did not own a car and had not purchased gasoline during the years in question, that she had explicitly reported these facts to petitioner, and that she had signed the return without reviewing its contents because of her confidence in petitioner (Tr. 36-37, 44). In addition, Coleman stated that the gasoline tax deduction did not appear on the copy of her 1972 tax return that she had received from petitioner (Tr. 40).

The 1972 Burgos return (G.X. 5) claimed deductions for union dues, work clothes, and medical insurance premiums. Although Burgos testified that he did not authorize petitioner to enter the deductions in the amounts claimed (Tr. 55-57), he stated on cross-examination that he did belong to a union, that he had incurred medical insurance and work clothes expenses during the tax year, and that he had discussed each of these items with petitioner (Tr. 57-60).

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[1]"G.X." refers to the government's exhibit number at trial.

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During its deliberations, the jury returned to the courtroom and asked the following question (Tr. 156):

> Did Sarah Coleman testify that the copy of her income tax [return] * * * did not have the gas deduction on it?

To avoid giving any portion of Coleman's testimony undue emphasis or reading it out of context, the court ordered that her entire testimony — in which she claimed that the gasoline tax deduction did not appear on her copy of the 1972 return — be read to the jury. The jury subsequently rendered verdicts of guilty on the two counts involving Coleman's tax returns and on the one count involving Dominiak's return. Petitioner was acquitted of fraudulently preparing the Burgos return (Tr. 157-158).

Subsequent to trial, it was determined that, contrary to Coleman's testimony, her copy of her 1972 income tax return did show the gasoline tax deduction. The district court therefore granted petitioner a new trial on both of the Coleman counts, but it refused to overturn the conviction on the Dominiak count (Pet. App. B).

2. The district court correctly ruled that the interests of justice did not require a new trial for petitioner on the Dominiak count.[2] See Fed. R. Crim. P. 33. Although Coleman's erroneous testimony could have influenced

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[2]Although petitioner suggests (Pet. 11) that "it is arguable that [government counsel] should have known the true contents" of Coleman's copy of her 1972 tax return, he does not contend, nor does the record indicate, that government counsel in fact knew of the inaccuracy of Coleman's testimony during trial. See *Pyle* v. *Kansas*, 317 U.S. 213. Nor is this a case in which the government learned of the falsity during trial but made no effort to correct it. See *Alcorta* v. *Texas*, 355 U.S. 28. Indeed, here *petitioner* presumably was fully aware during trial that Coleman's testimony was inaccurate, yet he never asked that her copy of her tax return be produced in order to settle the issue he now claims was crucial to the verdict.

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the jury's determination of whether petitioner had fraudulently prepared *her* return, petitioner failed to show how that testimony — which essentially related to Coleman's credibility—"could * * * in any reasonable likelihood have affected the judgment of the jury" on the Dominiak count. *Napue* v. *Illinois*, 360 U.S. 264, 271; see also *Giglio* v. *United States*, 405 U.S. 150, 154. The evidence adduced on each count was separate and distinct, consisting of the allegedly fraudulent tax return that formed the basis for the charge and the testimony of the taxpayer for whom the return was prepared. The offenses were interrelated only by their alleged commission during the conduct of petitioner's tax consulting business. Indeed, petitioner's acquittal on the Burgos count clearly indicates that the jury considered each charge separately.[3]

3. Nor is there merit to petitioner's contention (Pet. 6) that he was denied a fair trial by the court's decision to read Coleman's entire testimony (consisting of only 11 transcript pages) in response to the jury's question, rather than to submit to the jury the copy of the 1972 tax return itself. Determination of the proper method by which

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[3]Petitioner contends (Pet. 6-8) that Coleman's testimony about the contents of her copy of the return could have provided the jury with a theory as to how petitioner had filed the fraudulent returns without his clients' knowledge, and that the jury's request for a rereading of Coleman's testimony indicates that the acceptance of such a theory was crucial to the jury's verdict on all of the charges. Petitioner's theory, however, does not "rise * * * above the level of speculation," and certainly does not merit the relief requested. *Ross* v. *Texas*, 474 F. 2d 1150, 1153 (C.A. 5); *United States* v. *DeVoe*, 493 F. 2d 776 (C.A. 5). Moreover, this theory—which was never argued to the jury—fails to explain the jury's acquittal on the Burgos count. Finally, the unrebutted testimony at trial established that petitioner did not provide his clients with copies of their returns until several months after the returns were prepared and filed (Tr. 33, 57, 84-86), at which time few of the taxpayers could be expected to re-examine their tax status for the previous year. This provides a more plausible explanation for the clients' lack of awareness of petitioner's fraudulent conduct and, indeed, was the theory that the government argued to the jury (Tr. 139-1).

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to honor a jury's request to rehear evidence is addressed to the discretion of the court. *Allis* v. *United States*, 155 U.S. 117; *United States* v. *Chicarelli*, 445 F. 2d 1111, 1115 (C.A. 3). Here, the copy of Coleman's tax return had not been introduced into evidence, and the jury did not ask to see a copy of the return but only to rehear Coleman's testimony about it. Finally, petitioner raised no objection to the manner in which the court proposed to respond to the jury's inquiry.

4. Petitioner and his wife, Elinor Ganie, originally were charged with thirteen counts of preparing fraudulent tax returns and one count of conspiracy to commit those offenses. This indictment was read to the venire during *voir dire* (Tr. 3-A to 3-D). After the jury had been sworn but prior to commencement of the trial, the government moved to dismiss the indictment against Elinor Ganie and to dismiss all but five of the substantive counts against petitioner.[4] The motion was granted without objection (Tr. 6-7).

Petitioner contends (Pet. 13-14) that the lengthy original indictment predisposed the jury "to believe that the petitioner had done something wrong being accused of doing the same thing fourteen different times" (Pet. 14) and that the prosecutor's motion to dismiss several of the counts at the outset of the trial was calculated to impress the jury with the government's generosity and the strength of the remaining charges. The motion to dismiss was in full accord with Rule 48(a) of the Federal Rules of Criminal Procedure, however, and there is no basis in the

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[4]The court dismissed one of the remaining counts at the end of the government's case (Tr. 66-67). Although petitioner intimates (Pet. 14) that he was prejudiced because the jury was not told of this dismissal until after he testified, the court delayed in informing the jury only because of petitioner's explicit assent to that procedure (Tr. 70).

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record for petitioner's allegations of bad faith. Significantly, petitioner raised no objection to the dismissal at the time, nor did he either suggest a specific cautionary instruction to the jury or move for a mistrial on the remaining counts. Moreover, the trial court advised prospective jurors during *voir dire* (Tr. 3-D), and instructed the jury prior to its deliberations (Tr. 144), that an indictment was not evidence and could not give rise to any inference of guilt. Although petitioner speculates on the possible effect that the dismissal may have had on the jurors, it is equally plausible — and equally speculative — that the dismissal was interpreted by the jury as a sign of weakness of the government's proof.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.